Pendaftar Hakmilik Negeri Selangor & Ors v Shaifulizam bin Mohd Saleh & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01(NCVC)(W)-394–10 OF 2016 AND B-01(NCVC)(W)-395–10 OF 2016
UMI KALTHUM, ZALEHA YUSOF AND YAACOB MD SAM JJCA
20 FEBRUARY 2020

Land Law — Indefeasibility of title and interest — Fraudulent transfer of land — First defendant obtained property by way of forged documents — Whether second defendant's interest in property defeasible — National Land Code ss 22, 90 & 429–433

Tort — Negligence — Duty of care — — Whether there was negligence on part of land office — Whether there was negligence on part of second defendant — Whether plaintiff and/or second defendant entitled to damages —

These two appeals emanated from the decision of the High Court. For ease of reference, parties would be referred to as they were in the High Court. The plaintiff was the original registered owner of a piece of property ('the property') and had entered into a sale and purchase agreement, to sell the property to the first defendant. It was alleged by the plaintiff that the first defendant had fraudulently transferred the property to himself; and that to facilitate the fraudulent transfer of the property from the plaintiff to the first defendant, the first defendant used the issue document of final title for the property he obtained from the Pejabat Daerah dan Tanah Petaling together with a number of forged documents to create the false impression that the plaintiff had sold the property to him. Using the forged documents, the first defendant obtained a loan from the second defendant and the terms of the loan were formalised in a facility agreement. The security of the facility agreement was a charge over the property. The loan was disbursed by way of a bankers' cheque. However, the first defendant defaulted in the payment of the loan. The second defendant commenced foreclosure proceedings and obtained an order for sale of the property. The plaintiff claimed that he only realised that he had been defrauded after he discovered that the second defendant intended to sell his property by way of public auction. Subsequently, the plaintiff commenced proceedings in the High Court against all the defendants to assert his rights to the property. After a full trial, the learned trial judge allowed the plaintiff's claim against the first defendant and declared that the first defendant's title-interest in the property was defeasible and ought to be set aside. The trial judge further dismissed the plaintiff's claim against the second defendant and ordered the

second defendant be at liberty to proceed with the auction to sell the property. Aggrieved with the decision that the second defendant's charged interest was indefeasible, the plaintiff appealed via Appeal 395. The land office was also aggrieved with the same and also the finding of negligence on their part and appealed via Appeal 394. The issues for consideration were: (a) whether there was negligence on the part of the land office; (b) whether there was negligence on the part of the second defendant; (c) whether the second defendant's interest in the property was defeasible; and (d) whether the plaintiff and/or the second defendant were entitled to damages.

Held, dismissing Appeal 394 and allowing Appeal 395:

(1) Conspiracy was never an issue as it had not been pleaded by the plaintiff. As such, the learned trial judge erred when His Lordship made a finding that there was conspiracy between the land office and the first defendant to defraud the plaintiff in the transfer of the property to the first defendant. Next, there was no necessity to name all those officers in the claim of this nature. By virtue of ss 12 and 16 of the National Land Code ('the NLC'), defendants 3, 4 and 6 were more than sufficient parties. Even the state government had nothing to do with the proceedings under the NLC. Hence there was no merit in the argument of the learned assistant to the state legal advisor on the non-compliance of ss 5 and 6 of the Government Proceedings Act 1956 (see paras 26 & 29).

(2) There was no evidence to show all the notices required to be served on the plaintiff had actually been served on him. Even though the plaintiff had failed to update his latest address with the land office, no evidence was adduced by the land office to show that other modes of service were used to notify the plaintiff and as envisaged under Part 33, ss 430 to 433 of the NLC. Moreover, there was no action taken against the plaintiff for his failure to notify the change of his address as provided for by s 429 of the NLC. Thus, the learned trial judge had not erred in his finding that the land office had failed to comply with the provisions of the NLC with respect to the conversion of the qualified title into the final title. Such acts and omissions on the part of the land office amounted to improper conduct and reflected bad faith which clearly showed negligence on their part. Further, the non-compliance of the NLC showed a breach of their statutory duty which was equally a breach of a common law duty of care. The land office had failed to properly keep land title details and land titles secured in the manner required by the NLC. The land office could not rely on s 22 of the NLC when it could not explain how the file relating to the property was lost and how the final title of the property could fall into the hands of the first defendant (see paras 32, 36 & 38–39).

(3) The alleged 'omissions' on the part of the solicitor for the second defendant seemed related more closely to the question of carelessness or

standard of care than to the duty of care. It was unforeseeable for the second defendant that its solicitor's 'omissions' might cause the plaintiff to be deprived of his rights to the property, especially when the first defendant was its long time client. There was no proximity between the second defendant and the plaintiff. The second defendant acted on the advice of its solicitor and it owed no duty of care to the plaintiff nor to the land office. Hence the issue of negligence on the part of the second defendant was actually a non-issue (see para 45).

(4) The property was never sold to the first defendant. The first defendant had obtained the title by way of forged documents. The first defendant was a fraudster and there was no doubt about this. In such circumstances, the second defendant's registered charge interest in the property was defeasible and ought to be set aside (see paras 51–52).

(5) The issue of damages to be paid to the plaintiff was no longer relevant. The second defendant's registered interest in the property was said to be defeasible which meant it was invalid and unenforceable. The property should be retransferred to the plaintiff. The second defendant was only entitled to the special damages but not the general damages as there were only evidence to show the special damages (see paras 56 & 64–65).

[Bahasa Malaysia summary

Kedua-dua rayuan ini berpunca dari keputusan Mahkamah Tinggi. Untuk kemudahan rujukan, pihak-pihak akan disebut ketika mereka berada di Mahkamah Tinggi. Plaintif adalah pemilik berdaftar yang asal sebidang hartanah ('hartanah') dan telah membuat perjanjian jual beli, untuk menjual harta itu kepada defendan pertama. Adalah didakwa oleh plaintif bahawa defendan pertama telah secara fraud memindahkan hartanah itu kepada dirinya; dan bahawa untuk memudahkan pemindahan secara fraud hartanah dari plaintif kepada defendan pertama, defendan pertama menggunakan dokumen hak milik keluaran akhir untuk hartanah yang diperolehnya dari Pejabat Daerah dan Tanah Petaling bersama sejumlah dokumen palsu untuk membuat tanggapan palsu bahawa plaintif telah menjual hartanah itu kepadanya. Dengan menggunakan dokumen palsu, defendan pertama memperoleh pinjaman dari defendan kedua dan terma pinjaman tersebut diformalkan dalam perjanjian kemudahan. Jaminan perjanjian kemudahan adalah cagaran ke atas hartanah. Pinjaman tersebut dikeluarkan melalui cek. Bagaimanapun, defendan pertama gagal membayar pinjaman. Defendan kedua memulakan prosiding penyitaan dan memperoleh perintah penjualan harta tanah. Plaintif mendakwa bahawa dia hanya menyedari bahawa dia telah ditipu setelah dia mengetahui bahawa defendan kedua berniat menjual hartanya melalui lelongan awam. Selepas itu, plaintif memulakan prosiding di Mahkamah Tinggi terhadap semua defendan untuk menegaskan haknya terhadap hartanah tersebut. Setelah perbicaraan penuh, hakim bicara yang bijaksana membenarkan tuntutan plaintif terhadap defendan pertama dan

menyatakan bahawa kepentingan hak milik defendan pertama dalam hartanah itu boleh disangkal dan harus diketepikan. Hakim bicara selanjutnya menolak tuntutan plaintif terhadap defendan kedua dan memerintahkan defendan kedua bebas untuk melelong untuk menjual harta tanah. Terkilan dengan keputusan bahawa kepentingan cagaran defendan kedua tidak dapat disangkal, plaintif mengemukakan rayuan melalui Rayuan 395. Pejabat Tanah juga terkilan dengan perkara yang sama dan juga penemuan kecuaian di pihak mereka dan mengemukakan rayuan melalui Rayuan 394. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat kecuaian di pihak Pejabat Tanah; (b) sama ada terdapat kecuaian di pihak defendan kedua; (c) sama ada kepentingan defendan kedua terhadap hartanah boleh disangkal; dan (d) sama ada plaintif dan/atau defendan kedua berhak mendapat ganti rugi.

Diputuskan, menolak Rayuan 394 dan membenarkan Rayuan 395:

(1) Konspirasi tidak pernah menjadi isu kerana tidak dituntut oleh plaintif. Oleh itu, hakim bicara yang bijaksana keliru ketika Yang Arif membuat keputusan bahawa ada konspirasi antara Pejabat Tanah dan defendan pertama untuk menipu plaintif dalam pemindahan harta itu kepada defendan pertama. Seterusnya, tidak ada keperluan untuk menamakan semua pegawai tersebut dalam tuntutan seperti ini. Berdasarkan ss 12 dan 16 Kanun Tanah Negara ('Kanun'), defendan 3, 4 dan 6 lebih dari sekadar pihak yang mencukupi. Malah kerajaan negeri tidak ada kaitan dengan prosiding di bawah Kanun. Oleh itu, tiada merit dalam hujahan pembantu penasihat undang-undang negeri yang bijaksana mengenai ketidakpatuhan ss 5 dan 6 Akta Prosiding Kerajaan 1956 (lihat perenggan 26 & 29).

(2) Tidak ada bukti yang menunjukkan bahawa semua notis yang dikehendaki disampaikan kepada plaintif sebenarnya telah disampaikan kepadanya. Walaupun plaintif gagal mengemas kini alamat terbarunya dengan Pejabat Tanah, tidak ada bukti yang ditambahkan oleh Pejabat Tanah untuk menunjukkan bahawa cara penyampaian lain digunakan untuk memberi tahu plaintif dan seperti yang dijelaskan di bawah Bahagian 33, ss 430 hingga 433 Kanun. Selain itu, tidak ada tindakan yang diambil terhadap plaintif atas kegagalannya untuk memberitahu perubahan alamatnya sebagaimana yang diperuntukkan oleh s 429 Kanun. Oleh itu, hakim bicara yang bijaksana tidak terkhilaf dalam penemuannya bahawa Pejabat Tanah telah gagal mematuhi peruntukan Kanun berkenaan dengan penukaran hakmilik yang layak menjadi hak milik akhir. Tindakan dan peninggalan seperti itu dari pihak Pejabat Tanah dianggap sebagai kelakuan yang tidak betul dan mencerminkan niat buruk yang jelas menunjukkan kelalaian pihak mereka. Selanjutnya, ketidakpatuhan Kanun menunjukkan pelanggaran tugas berkanun mereka yang juga merupakan pelanggaran kewajipan menjaga di bawah *common law*. Pejabat Tanah telah gagal menyimpan perincian hak milik

tanah dan hak milik tanah dengan cara yang dikehendaki oleh Kanun. Pejabat Tanah tidak boleh bergantung pada s 22 Kanun ketika tidak dapat menjelaskan bagaimana fail yang berkaitan dengan hartanah itu hilang dan bagaimana hakmilik akhir hartanah itu dapat jatuh ke tangan defendan pertama (lihat perenggan 32, 36 & 38–39).

(3) Dakwaan 'pengabaian' peguam untuk defendan kedua nampaknya lebih berkaitan dengan persoalan kecuaian atau standard penjagaan daripada kewajipan menjaga. Tidak terjangka bagi defendan kedua bahawa 'pengabaian' peguamnya dapat menyebabkan plaintif kehilangan haknya terhadap harta tersebut, terutama ketika defendan pertama adalah pelanggannya yang lama. Tiada hubungan antara defendan kedua dan plaintif. Defendan kedua bertindak atas nasihat peguamnya dan pihaknya tidak bertanggungjawab terhadap plaintif atau juga Pejabat Tanah. Oleh itu, isu kecuaian pihak defendan kedua sebenarnya bukan isu (lihat perenggan 45).

(4) Hartanah itu tidak pernah dijual kepada defendan pertama. Defendan pertama memperoleh hak milik tersebut dengan menggunakan dokumen palsu. Defendan pertama adalah penipu dan tidak ada keraguan mengenai perkara ini. Dalam keadaan seperti itu, kepentingan cagaran defendan kedua atas hartanah itu boleh disangkal dan harus diketepikan (lihat perenggan 51–52).

(5) Isu ganti rugi yang harus dibayar kepada plaintif tidak lagi relevan. Kepentingan defendan kedua terhadap hartanah itu dikatakan boleh disangkal yang bermaksud tidak sah dan tidak dapat dilaksanakan. Hartanah itu harus diserahkan semula kepada plaintif. Defendan kedua hanya berhak mendapat ganti rugi khas tetapi bukan ganti rugi am kerana hanya ada bukti yang menunjukkan ganti rugi khas (lihat perenggan 56 & 64–65).]

Cases referred to

CIMB Bank Bhd v AmBank (M) Bhd & Ors [2017] 5 MLJ 142, FC (distd)
Esser v Brown [2004] BCJ No 1312, CA (folld)
Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (refd)
Government of the State of Sabah v Syarikat Raspand [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (distd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (distd)
Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal [2016] 5 MLJ 141; [2017] 3 CLJ 257, FC (refd)
Malayan Banking Bhd & Ors v Tho Siew Wah & Anor and another appeal [2017] 2 MLJ 721; [2017] 7 CLJ 573, CA (refd)

Overseas Realty Sdn Bhd v Wong Yau Choy & Ors (Tetuan Tay Ibrahim & Partners, third party) [2014] MLJU 1868; [2014] 8 CLJ 107, HC (refd)
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong [2016] 6 MLJ 413; [2016] 9 CLJ 297, FC (folld)
Pendaftar Hakmilik, Pejabat Tanah dan Galian Negeri Selangor v Bank Pertanian Malaysia Bhd [2016] 2 MLJ 543; [2016] 3 CLJ 851, CA (distd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, FC (refd)
Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Government Proceedings Act 1956 ss 5, 6
National Land Code ss 12, 16, 16(2), 15, 22, 90, 166, 168, 192, 340, 340(3), 429, 430, 431, 432, 433, Part 33, Forms 2B, 5F, 10D, 14A
Solicitor's Remuneration Order 2005 r 7

Appeal from: Suit No 21NCVC-108–07 of 2012 (High Court, Shah Alam)

Mohd Syahrizal Syah bin Zakaria (Wan Norazmi bt Kassim with him) (Selangor State Legal Advisor) in Appeal No B-01(NCVC)(W)-394–10 of 2016 for the appellant.
Yastiswara Ramachandran (Rodney Koh and Kenny Chen Yew Hoong with him) (Azri, Lee Swee Seng & Co) in Appeal No B-01(NCVC)(W)-395–10 of 2016 for the appellant.
Yastiswara Ramachandran (Rodney Koh and Kenny Chen Yew Hoong with him) (Azri, Lee Swee Seng & Co) in Appeal No B-01(NCVC)(W)-394–10 of 2016 for the first respondent.
Shanti Mogan (Hee Hui Ting with her) (Shearn Delamore & Co) in Appeal No B-01(NCVC)(W)-395–10 of 2016 for the first respondent.
Shanti Mogan (Hee Hui Ting with her) (Shearn Delamore & Co) in Appeal No B-01(NCVC)(W)-394–10 of 2016 for the second respondent
Mohd Syahrizal Syah bin Zakaria (Wan Norazmi bt Kassim with him) (Kamar Penasihat Undang-Undang Negeri Selangor Darul Ehsan) in Appeal No B-01(NCVC)(W)-395–10 of 2016 for the second to 12th respondents.

Zaleha Yusof JCA:

[1] These two appeals emanated from the decision of the High Court at Shah Alam ('High Court suit') dated 29 August 2016. In Civil Appeal No B-01(NCVC)(W)-394–10 of 2016 ('Appeal 394'), the appellants were the third to 13th defendants in the High Court suit; while the first respondent was the plaintiff and the second respondent was the second defendant in the High

A Court suit. In Civil Appeal No B-01(NCVC)(W)-395–10 of 2016 ('Appeal 395'), the appellant was the plaintiff in the High Court suit while the first respondent was the second defendant and the second to 12th respondents were the third to 13th defendants in the High Court suit.

B **[2]** For ease of reference, parties will be referred to as they were in the High Court.

[3] The second, third and fifth defendants are the Selangor State Government agencies while the sixth to 13th defendants were their employees C (cumulatively all will be referred to as the 'Land Office').

[4] The subject matter in dispute here and below is a property held under qualified tittle HS(D) 143039, PT No 18037 in the Mukim of Damansara, D District of Petaling, State of Selangor (the said property). It was alleged by the plaintiff that the said property belonged to him and it had been fraudulently transferred to the name of a fraudster, the first defendant in the High Court suit. The first defendant had used the said property to register a charge in favour of the second defendant. In the High Court suit, the first defendant was E represented by Amanah Raya Bhd as he has since passed on and had no personal representative.

[5] After a full trial, the learned trial judge allowed the plaintiff's claim F against the first defendant and declared that the first defendant's title-interest in the said property was defeasible and be set aside. The learned trial judge further dismissed the plaintiff's claim against the second defendant and ordered the second defendant be at liberty to proceed with the auction to sell the said property. Any surplus, after the sale and the sums owed to the second G defendant, was to be paid to the plaintiff and any shortfall between the sale price and the sums received by the second defendant was to be paid by the Land Office to the second defendant. The learned trial judge made the order after finding that the plaintiff was the victim of the first defendant's fraud and that the second defendant's charged interest was protected by the provision of H s 340(3) of the National Land Code ('the NLC') and that the Land Office was negligent.

[6] Aggrieved with the decision that the second defendant's charged interest was indefeasible, the plaintiff is now appealing before us. The Land Office is I also aggrieved with the same and also the finding of negligence on their part. Hence, they appeal before us too.

BACKGROUND FACTS

[7] It was not disputed that the plaintiff was the original registered owner of the said property, having bought it from Guthrie's Property Development Holding Sdn Bhd on 23 April 2002. A qualified title was issued under his name on 24 May 2004 and he has been in possession of the said issue document of qualified title for the said property until now.

[8] However, according to the plaintiff, unknown to the plaintiff, the Land Office had converted the qualified title for the said property to a final title on 25 May 2005.

[9] On 16 November 2009, the plaintiff had purportedly entered into a sale and purchase agreement, to sell the said property to the first defendant. It was alleged by the plaintiff that the first defendant had fraudulently transferred the said property to himself; and that to facilitate the fraudulent transfer of the said property from the plaintiff to the first defendant, the first defendant used the issue document of final title for the said property he obtained from the Pejabat Daerah dan Tanah Petaling together with a number of forged documents to create the false impression that the plaintiff had sold the said property to him. The forged documents the first defendant used for this purpose were a forged sale and purchase agreement dated 16 November 2009, a forged authorisation letter dated 8 January 2010, a forged statutory declaration purportedly made by the plaintiff, a forged identity card in the plaintiff's name and a forged memorandum of transfer dated 19 November 2009 (Form 14A of the NLC) purportedly signed by the plaintiff.

[10] Using the forged documents referred to above, the first defendant obtained a loan from the second defendant pursuant to a letter of offer dated 13 November 2009 and a revised letter of offer dated 31 December 2009. The terms of the loan were formalised in a Facility Agreement dated 20 January 2010. The security of the Facility Agreement was a charge over the said property which was executed and negotiated on 28 January 2010.

[11] The loan was disbursed by way of a bankers' cheque dated 4 February 2010. In or around October 2010, the first defendant defaulted in payment of the loan. The second defendant commenced foreclosure proceedings and obtained an order for sale of the said property on 27 April 2011. The plaintiff claims that he only realised that he had been defrauded after he discovered on 16 October 2011 that the second defendant intended to sell his property by way of public auction. The plaintiff lodged a police report on 17 October 2011. On 19 October 2011, a registrar's caveat was entered on the said property.

[12] However, the public auction scheduled on 19 October 2011 was postponed after the plaintiff had a meeting with the second defendant on 18 October 2011 alleging he was the owner of the said property by producing the qualified title to the said property and that he did not sell the same.

[13] Subsequently, the plaintiff commenced the present proceedings in the High Court against all the defendants to assert his rights to the said property.

ISSUES

[14] As the facts in both appeals intermingle and they emanated from the same decision of the trial judge, we shall deal with the issues in both appeals together. Based on the arguments of parties there is no dispute before us that the first defendant was a fraudster in the whole transaction. The issues before us now are:

(i) whether there was negligence on the part of the Land Office;

(ii) whether there was negligence on the part of the second defendant;

(iii) whether the second defendant's interest in the said property is defeasible; and

(iv) if the answers in (i) and (ii) are in the affirmative, whether the plaintiff and/or the second defendant are/is entitled to damages.

Whether there was negligence on the part of the Land Office

[15] The learned trial judge's decision on this issue can be found in paras 98, 107–112 of His Lordship's grounds of judgment as follows:

> [98] Defendan ketiga hingga ketigabelas tidak mengemukakan sebarang bukti untuk menyangkal. Oleh itu saya mendapati Defendan ketiga hingga ketigabelas adalah bertanggungjawab secara vikarious terhadap tindakan kakitangan mereka yang berkomplot dalam membantu/membolehkan defendan pertama melakukan frod terhadap plaintif dengan menyalurkan butir-butir/data berhubung hartanah milik plaintif tersebut.
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> ...
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> [107] Pada hemat saya, walaupun pentadbir/pendaftar berhak untuk memproses penukaran hakmilik sementara (QT) kepada hakmilik muktamad/kekal sepertimana yang dihujahkan peguam, notis (s 168 KTN), pengukuran/survey (s 396 KTN) dan penyerahan QT oleh pemilik (s 166(1)(c) KTN) masih perlu dipatuhi oleh pentadbir/pendaftar.
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> [108] Dalam kes kita ini berdasarkan keseluruhan keterangan saya mendapati defendan ketiga hingga ketigabelas gagal mematuhi peruntukan KTN tersebut. Saya mendapati defendan ketiga hingga ketigabelas gagal mengemukakan sebarang bukti peruntukan KTN berkenan telah dipatuhi. Segala rekod berhubung

peruntukan tersebut jika telah diambil sudah tentu berada dalam simpanan dan pengetahuan mereka. Namun mereka gagal kemukakan untuk menyangkal dakwaan plaintif. A

[109] Selain itu, saya mendapati pindahmilik hartanah plaintif telah berjaya dilakukan oleh defendan pertama (si mati) hasil pertolongan orang dalam/kakitangan Pejabat Tanah/PTG. Tiada penjelasan diberikan bagaimana defendan pertama memperolehi data/butir-butir hartanah tersebut dan pemilikannya. Pada hemat saya data/butir-butir hakmilik bagi hartanah tersebut tidak mungkin diperolehi oleh defendan pertama (si mati) kecuali dengan 'pertolongan' orang dalam di Pejabat Tanah. Segala rekod tentang pemilikan sesuatu tanah hanya diketahui oleh pemilik sendiri atau Pejabat Tanah yang menyimpan segala data pemilikan hartanah sama ada dalam data rekod manual atau data rekod berkomputer mereka. B C

[110] Selain plaintif sebagai pemilik, segala maklumat/data berhubung hartanah dan pemilikannya hanya berada dalam kawalan Pejabat Tanah/PTG. Dalam keadaan tersebut, apa yang boleh dirumuskan secara munasabah ialah orang/kakitangan dalam di Pejabat Tanah Petaling Jaya, tempat di mana data/butir-butir perihal hartanah tersebut disimpan, telah menyalurkan kepada defendan pertama (si mati) maklumat berkenaan dan telah membuka ruang/membolehkan defendan pertama/simati melakukan frod dan pemalsuan dokumen-dokumen berkenaan. Dalam kes kita ini, saya mendapati Pejabat Tanah/PTG sebagai pihak yang mengawal data/dokumen berkaitan gagal memberikan penjelasan bagaimana data tersebut boleh terlepas dan diperolehi oleh defendan pertama/si mati. D E

[111] Pejabat Tanah/PTG adalah Jabatan yang diamanahkan untuk menyimpan segala data/dokumen pemilik tanah. Mereka mempunyai tanggungjawab untuk memastikan keselamatan segala data/dokumen pemilik tersebut. Berhubung hartanah plaintif di sini, fakta membuktikan bahawa data/dokumen hartanah tersebut telah tanpa kebenaran plaintif disalurkan kepada pihak lain, sama ada secara terus kepada defendan pertama/simati atau melalui pihak ketiga. Perkara/keadaan tersebut pada hemat saya hanya boleh bermula dari Pajabat Tanah Petaling Jaya yang merupakan tempat di mana Hakmilik Sementara (QT) hartanah tersebut disimpan, selain Plaintif. F G

[112] Pada hemat saya, bagaimana defendan pertama/simati boleh memperolehi QT/data/butir-butir hartanah plaintif hanya boleh dijelaskan oleh pihak Pejabat Tanah/PTG. Ketirisan maklumat/data tersebut hanya boleh terjadi ekoran pakatan kakitangan defendan ketiga hingga ketigabelas dengan defendan pertama atau ekoran kecuaian mereka. Saya mendapati defendan ketiga hingga ketigabelas gagal mengemukakan sebarang bukti untuk menjelaskan perkara tersebut bagi menyangkal *pakatan atau kecuaian* mereka tersebut. Oleh itu saya mendapati defendan ketiga hingga Ketigabelas tidak berhak untuk berselindung di bawah seksyen 22 KTN. (Emphasis added.) H I

[16] From his grounds of judgment, the learned trial judge had found that the first defendant was able to defraud the plaintiff as a result of the 'inside help' of someone from the Land Office. His Lordship found that the Land Office

had failed to comply with the provisions of the NLC as a result of which the first defendant was able to commit the fraud. He found there was conspiracy to defraud between the first defendant and the Land Office and that the Land Office was vicariously liable to the plaintiff for negligence and was therefore not entitled to the protection provided by s 22 of the NLC.

[17] For the Land Office, learned assistant to the State Legal Advisor (ALA) argued that the trial judge had erred in finding that the Land Office was vicariously liable to the plaintiff for negligence and that they had conspired against the plaintiff for the benefit of the first defendant as conspiracy was a non-issue between the parties and had never been pleaded.

[18] It was submitted by the learned ALA that the plaintiff had failed to specifically identify the act of negligence of the Land Office's officers named in the suit and how they benefited from the alleged fraudulent transaction. This is against ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA'). He relied on the decisions of this court in *Pendaftar Hakmilik, Pejabat Tanah dan Galian Negeri Selangor v Bank Pertanian Malaysia Bhd* [2016] 2 MLJ 543; [2016] 3 CLJ 851 and in *Government of the State of Sabah v Syarikat Raspand* [2010] 5 MLJ 717; [2010] 7 CLJ 945. Also the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663.

[19] The ALA submitted that the standard operating procedure (SOP) had been in place and been practised by the Land Office in dealing with the conversion of the qualified title into the final title. Therefore he argued, there was no negligence on their part. If any, which they deny, they are protected by s 22 of the NLC.

[20] The ALA further submitted that it was the plaintiff and the second defendant who had been negligent. He submitted that the notice of conversion had indeed been sent to the plaintiff albeit to the old address. It was the plaintiff who failed to update his current address to the Land Office. The plaintiff's indifferent attitude could be seen when, in his evidence in court, he admitted that he did not pay the quit rent on the said property between the years 2005 and 2009 on the ground that he did not receive the bill. But the bill was not received because he did not update his latest address to the Land Office. Had the address been updated, he would have received the notice of conversion of the qualified title to the final title and the fraudulent dealing could have been avoided.

[21] Learned ALA also submitted that besides the plaintiff, the second defendant was also negligent as it knew that the plaintiff was staying at the said property when at the same time having an address at Subang Jaya, his old

address, and yet did not take any step and due diligence to establish the owner of the said property before proceeding with the loan agreement with the first defendant. Further, the valuation report for the purpose of granting the loan to the first defendant was not produced by the second defendant hence denying the parties from appraising whether the valuation was comprehensively done. For this reason learned ALA urged this court to invoke s 114(g) of the Evidence Act 1950 against the second defendant.

[22] Learned counsel for the plaintiff submitted that the learned trial judge was correct in His Lordship's finding that the Land Office was negligent as there was no compliance of the procedure provided by the NLC with regards to the conversion of the qualified title into the final title by the Land Office; in particular ss 90 and 192 of the NLC. Learned Counsel pointed out that the plaintiff did name the officers of the Land Office in their pleading according to the names given by the Land Office and the plaintiff had specified the breach committed in paras 47–51 of his statement of claim. Further, learned counsel for the plaintiff submitted that the purported identity card of the plaintiff lodged at the Land Office for the purpose of the transfer of the said property to the first defendant did not recognise the plaintiff as a Muslim. Had the Land Office been careful in perusing the said document, the obvious forgery could have been discovered. Learned counsel further submitted that the Land Office had failed to explain why the procedure under the NLC for the conversion of the qualified tittle to the final title in this case was not followed. It was in evidence that the file for the said property was missing but the Land Office had also failed to explain how and why the Land Office's file for the said property was missing.

[23] This, according to learned counsel, reinforced the point that the Land Office could not claim the benefit of good faith defence under s 22 of the NLC.

[24] Likewise, learned counsel for the second defendant also submitted that the learned trial judge had correctly found that the Land Office was negligent, hence this finding ought not to be disturbed by this court. To further strengthen his argument, learned counsel for the second defendant submitted that the witness for the Land Office, the 13th defendant, in his evidence had agreed that there was negligence on the Land Office's part in the handling of the matter and that the Land Office did not have a record as to whom the final tittle in respect of the said property was released. Another witness for the Land Office, the 12th defendant, in her evidence had admitted that there was a deficiency in the record keeping systems and there were shortcomings on their part. Learned counsel for the second defendant concurred with learned counsel for the plaintiff that unlike the authorities cited by the learned ALA, the officers of the Land Office in this case, had in fact been named.

[25] We have carefully considered the submissions of the parties on this first issue. Before discussing further, we reproduce some of the relevant provisions of the law cited by the parties, especially ss 22, 90 and 192 of the NLC:

> 22 Protection of officers
>
> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.
>
> 90 Issue of issue documents of title
>
> (1) Where any issue document of title prepared under this Chapter is ready for issue to the proprietor of any land, the Land Administrator may serve on the proprietor a notice in Form 5F requiring him to attend in accordance with the terms of the notice, for the purpose of taking delivery of the document and paying any item of land revenue then outstanding in respect of the land.
>
> (2) The Land Administrator shall require the receipt of any issue document to be acknowledged in such form as may be prescribed.
>
> (3) Where any issue document is not collected by the proprietor or his agent pursuant to any notice under sub-section (1), it shall be retained by the Registrar or Land Administrator for issue in such circumstances, and upon payment of such fees, as may be prescribed.
>
> 192 Preparation, registration and issue of documents of final title
>
> (1) The documents of final title to be prepared, registered and issued in respect of any land under this Chapter shall consist of —
>
> (a) a register document in the form of a grant, State lease, Mukim grant of Mukim lease, according as the land is held under the form of qualified title corresponding to Registry title or that corresponding to Land Office title, and in perpetuity or for a term of years; and
>
> (b) an issue document in the form appropriate under this Act to the register document in question.
>
> (2) Where an issue document of qualified title exists in respect of the land, the Registrar or Land Administrator, as the case may be, shall, before issuing final title under this Chapter —
>
> (a) call for its production as mentioned in paragraph (c) of subsection (1) of section 166; and
>
> (b) if it is not produced, take the further steps specified in section 168.
>
> (3) The registration of register documents of title prepared under this Chapter shall consist of their authentication under the hand and seal of the Registrar or Land Administrator, as the case may be; and the date of registration shall be inscribed on every such document by the Registrar or Land Administrator.

(4) The provisions of sections 89 to 91 shall apply to documents of final title prepared under this Chapter as they apply to documents of final title prepared under Chapter 3 of Part Five.

Provided that where the land to which any such documents relate is subject to a charge or lien, nothing in section 90 shall be taken to authorise the issue of the issue document to the proprietor of the land.

[26] We have also perused the statement of claim of the plaintiff which had been amended thrice. We agree with the Land Office's submission that conspiracy was never an issue as it had not been pleaded by the plaintiff. It is trite that parties are bound by their pleadings. As such, the learned trial judge, in our opinion, erred when His Lordship made a finding that there was conspiracy between the Land Office and the first defendant to defraud the plaintiff in the transfer of the said property to the first defendant.

[27] Be that as it may, we are of the view that the pivotal point for us to decide is whether the Land Office was negligent in regard to the whole transaction. In order to decide this, we need to determine whether the right parties have been named in the suit. Next, whether the procedure provided for by the NLC to convert the qualified title to the final title was adhered to by the Land Office?

[28] On whether the right parties have been named, it was not disputed that the names of the seventh defendant to the 13th defendant were supplied by the Land Office itself. It means that those defendants were the officers responsible for the whole transaction in questioned. We find the three authorities, that is the case of *Bank Pertanian Malaysia*, *Syarikat Raspand*, and *Lay Kee Tee*, cited by the learned ALA can be distinguished. Unlike this suit, no officer had been named in those three authorities. The issue of who to be held liable and who to be sued in land matters such as in this case is not a novel issue. It has been raised from time to time. In fact the NLC itself, in particular s 12 read together with sub-s 16(2) of the NLC, are very clear in stating that any action relating to land in which it is sought to establish any liability on the State Authority, shall be brought against the State Director in the name of his 'office'. This is the correct position as s 12 of the NLC provides that the Registrar of Title and his officers are all under the control and supervision of the State Director. It means that he is responsible for their acts.

[29] Reverting to our case, we find there is no necessity to name all those officers in the claim of this nature. By virtue of ss 12 and 16 of the NLC, which are specific provisions relating to land as compared to ss 5 and 6 of the GPA, defendants three, four and six are more than sufficient parties. Even the State Government has nothing to do with the proceedings under the NLC as decided by the Federal Court in *Government of the State of Negeri Sembilan &*

Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123. See also the recent decision of this Court in *Malayan Banking Bhd & Ors v Tho Siew Wah & Anor and another appeal* [2017] 2 MLJ 721; [2017] 7 CLJ 573. Hence we find there is no merit in the argument of the learned ALA on the non-compliance of ss 5 and 6 of the GPA in this case.

[30] Next, the NLC provides for the procedure of converting a qualified title into a final title. The first step is to issue a Form 2B notice to the land owner to produce his issue document of qualified title. This is provided for in s 192 to be read together with ss 166 and 15 of the NLC. If there is no response from the land owner of the Form 2B notice, s 166, read together with s 168, require the Registrar or Land Administrator to cause notice of his intention to be published in the *Gazette* in Form 10D and also serve on every person or body having a registered interest in the land in accordance with s 433 including affixing it in the area in which the land is situated. In this instance, on the said property.

[31] Once the procedure stated above is satisfied, and the final title is issued, the Land Administrator is required to serve a Form 5F notice to the land owner to collect his issue document of final title. If the land owner or his agent fails to collect his issue document of final title, the said document of final title shall be retained by the Registrar or the Land Administrator. This is clearly stated in s 90 read together with s 192 of the NLC.

[32] Now, has this procedure been followed by the Land Office? Other than the submission of the learned ALA that the SOP had been followed, we find there is no evidence to show all the notices required to be served on the land owner, in this instance, the plaintiff, had actually been served on him. Even though the plaintiff has failed to update his latest address with the Land Office, no evidence was adduced by the Land Office to show that other modes of service were used to notify the plaintiff and as envisaged under Part 33, ss 430–433 of the NLC. Moreover, there was no action taken against the plaintiff for his failure to notify the change of his address as provided for by s 429 of the NLC.

[33] We have also examined the photocopy of the identity card (I/C) purportedly belonging to the plaintiff as shown at Tab 36 of the Common Core Bundle, Volume 3. The photocopy of the I/C was clearly faked as it failed to denote the plaintiff as a Muslim when his name showed that he is a Malay. Had the Land Office exercised further care, this could easily be detected.

[34] As alluded to above, s 433 of the NLC requires the Land Office to affix in a conspicuous position, on the said property, notice in Form 10D which is

the notice of the Land Office's intention to convert the qualified title into final title. This clearly had not been done. Otherwise the plaintiff who was staying in the said property would have known it.

[35] According to the evidence of the 12th and 13th defendants, the issue document of final title could only be given to the plaintiff upon production and surrender of his old issue document of qualified title. It was also the evidence of the 12th defendant that when a landowner comes to the Land Office to collect his new issue document of title, he must at the very least bring his old issue document of title and identity card. Without proof of his identity and evidence that he has his old issue document of final title, he will not be given his new issue document of title. If a new issue document of title is not collected, according to the 12th defendant and another witness SD12, it should be kept in the Pejabat Tanah Petaling's safe room. As explained by the witnesses for the third to 13th defendants themselves, the procedure for safeguarding an uncollected issue document of title if followed strictly would have made it impossible for anyone but the true owner of the land named in the issue document of title to collect that title.

[36] Having looked at all the evidence in totality, we find the learned trial judge had not erred in his finding that the Land Office had failed to comply with the provisions of the NLC with respect to the conversion of the qualified title into the final title.

[37] Next is the issue of the transfer of the title of the said property to the first defendant. The question raised is how did the final title of the said property fall into the hands of the first defendant? Section 90 of the NLC requires the final title to be retained by the Land Office. But it fell into the hands of the first defendant. And yet the Land Office did not have any record as to whom the final title in respect of the said property was released to. As alluded to earlier, their own witness admitted that there was a deficiency in the record keeping systems and there were shortcomings on their part. Their witnesses even admitted there was negligence on their part. To further aggravate matters, the Land Office's file for the said property was missing.

[38] Such acts and omissions on the part of the Land Office amount to improper conduct and these improper conduct of the Land Office reflect bad faith on their part which, in our view, clearly show negligence on their part. Further, the non-compliance of the NLC shows a breach of their statutory duty which is equally a breach of a common law duty of care. The Land Office has failed in our view to properly keep land title details and land titles secure in the manner required by the NLC. In *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2016] 6 MLJ 413; [2016] 9 CLJ 297, the Federal Court had, inter alia, held that the

A administrative shortcoming on the part of the Land Administrator or Registry amounts to negligence. This is clearly the case here as admitted by the Land Office's own witnesses.

B **[39]** In *Poh Yang Hong*, the Federal Court held the existence of two sets of record of title under two different persons as the registered owners of the same property without reasonable explanation definitely will not qualify to be an act done in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on the Land Administrator by or under s 22 of the NLC. Using the same argument, we find the Land Office cannot rely on C s 22 of the NLC when it cannot explain how the file relating to the said property was lost and how the final title of the said property could fall into the hands of the first defendant. On these premises, our answer to issue (i) is in the affirmative.

D *Whether there was negligence on the part of the second defendant*

[40] The learned trial judge's decision on the second issue can be found in paras 90–92 of His Lordship's grounds of judgement. He found:

E [90] Saya mendapati pihak plaintif sebagai pihak yang membuat dakwaan (alleging party) gagal membuktikan bahawa defendan kedua (Maybank) sama ada secara sendiri atau melalui peguam mereka telah cuai dalam transaksi memberikan/meluluskan pinjaman dan seterusnya transaksi gadaian hartanah tersebut. Tiada bukti dikemukakan oleh Plaintif bahawa dokumen-dokumen yang F dikemukakan kepada defendan kedua (Maybank) oleh defendan pertama (si mati) semasa memohon pinjaman adalah dokumen-dokumen yang prima facie mencurigakan/menimbulkan kecurigaan berhubung kesahihan dokumen-dokumen tersebut. Malah, saksi-saksi defendan ketiga hingga ketigabelas (SD10 dan SD11) yang merupakan mereka yang mana tugasan harian dan utama mereka adalah untuk menyemak dokumen-dokumen berkenaan bagi mengelak G penipuan pindahmilik, sendiri gagal mengesan pemalsuan pada dokumen-dokumen tersebut semasa dokumen-dokumen tersebut diproses oleh mereka.

[91] Peguam defendan kedua, SD4 dari Tetuan Hisham Yoong — KC Lim menerima dari peguam Simati, Tetuan Ku Abdul Rahman & Associates H dokumen-dokumen berkenaan iaitu, Surat Akuan Berkanun Plaintif (eksh 'D21'), Surat Akujanji (eksh 'D22'), Perjanjian Jual Beli (eksh 'D16'), Memorandum Pindah Milik/Borang 14A KTN (eksh 'P2'), salinan Kad Pengenalan Plaintif (eksh 'D23'), Resit Cukai Tanah (eksh 'D20A'), Resit Taksiran (eksh 'D20B') dan Surat Hakmilik Muktamad hartanah tersebut (eksh 'D13') yang mana I dokumen-dokumen tersebut telah disemak oleh pihak Defendan Keenam (Pejabat Tanah Daerah Petaling) dan Defendan Keempat (PTG).

[92] Berdasarkan fakta tersebut, saya mendapati tiada bukti Defendan Kedua mempunyai alasan untuk mencurigai dokumen-dokumen yang dikemukakan melalui peguam mereka adalah palsu. Saya mendapati Maybank telah dalam

keadaan dan fakta tersebut di perenggam di atas telah tidak cuai dan telah bertindak secara suci hati (bona fide) dalam melepaskan wang pinjaman berjumlah RM1,955,000 kepada peminjam Defendan Pertama (Teoh/si mati) melalui cek Maybank (eksh 'D28 A'). Bayaran pada 4 Februari 2010 tersebut adalah sebagai balasan bagi gadaian terhadap tanah tersebut.

[41] In brief the learned trial judge found there was no negligence on the part of the second defendant. The parties' arguments on the second issue have in fact been partly laid out in paras 20, 21 and 24 of the grounds of judgement. We find no necessity to reiterate the same except to further state that it was also the second defendant's argument that their financing lawyers cannot be held negligent on matters that took place between the sale and purchase lawyers who were not their lawyers. Learned counsel for the second defendant also argued that the learned trial judge had considered all the factors raised by the parties in finding that the second defendant was not negligent and was bona fide in releasing the loan sum to the first defendant as seen in paras 13–57 and 92 and 93 of His Lordship's grounds of judgment.

[42] It is also pertinent to mention that the plaintiff had set out in his written submission 7 factors which he claimed clearly showed that the second defendant's solicitors were negligent; hence the negligence of the second defendant. Among others, the second defendant's solicitor failed to investigate the clear evidence of forgery in the form of the fake identity card in the name of the plaintiff provided by the first defendant which did not contain the word 'Islam'; the forged statutory declaration purportedly affirmed by the plaintiff referred to the plaintiff as the purchaser of the property; failed to investigate how Messrs Ku Abdul Rahman and Associates could claim to act for both the plaintiff and the first defendant in breach of r 7 of the Solicitor's Remuneration Order 2005 and failed to explain how the second defendant's valuer could have valued the said property for the purpose of the loan or charge transaction without properly inspecting the said property.

[43] The Federal Court in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 held that in a claim based on the tort of negligence, it must first be shown that the defendant owed a duty of care, as a legal obligation, to the plaintiff and once the duty existed, the plaintiff must show that the defendant had breached it. One of the questions before the Federal Court in *Pushpaleela*, was whether a solicitor who acted for a fraudster owner of land and who sold the said land owed a duty of care to the real owners of the land. Amongst the authorities considered by the Federal Court was a Canadian Court of Appeal's case of *Esser v Brown* [2004] BCJ No 1312 which held:

30. As I have already mentioned, the trial judge seemed to hold that Ms Luoma owed the plaintiff a duty of care because of her finding that in the circumstances, Ms

> Luoma was careless in ignoring the 'red flags? described by the trial judge. With respect, the existence or non-existence of 'red flags? seems related more closely to the question of carelessness or standard of care than to the duty of care, which must be considered as a separate question of law. In other words, it is not correct, in my respectful opinion, to say that the notary owed a duty of care because there were 'red flags'? This conflates the question of whether there was carelessness on the defendant's part — ie failure to comply with a reasonable standard of conduct — with the question of duty of care. Standard is generally considered after a duty of care has been found and involves determining whether there were any established rules of her profession, or customary practices, that she failed to follow; or whether the 'warning signs' adverted to by the trial judge should reasonably have aroused her suspicion. If on examination the court is satisfied that the defendant's actions fell below that of a competent notary, then (assuming both a duty of care and a causal link between her conduct and the plaintiff's loss) liability will be imposed?'

[44] The Federal Court in *Pushpaleela*, had stated that a review of the cases in the United Kingdom and Canada indicates that solicitors do not owe a duty of care to third parties. It thereafter concluded that our court should not impose a duty of care on solicitors who acted for a fraudster owner of land who sold the said land, to also the real owner of the land, as there is no foreseeability, no proximity, and there are policy considerations against imposing such a duty.

[45] Reverting to the appeal before us, just like the case of *Esser v Brown*, we also view the alleged 'omissions' on the part of the solicitor for the second defendant seems related more closely to the question of carelessness or standard of care than to the duty of care. We do not find that it was foreseeable for the second defendant that its solicitor's 'omissions' might cause the plaintiff to be deprived of his rights to the said property, especially when the first defendant was its long time client. There was no proximity between the second defendant and the plaintiff. The second defendant acted on the advice of its solicitor and it owes no duty of care to the plaintiff nor to the Land Office. Hence we find the issue of negligence on the part of the second defendant is actually a non-issue, therefore we answer this second issue in the negative.

Whether the second defendant's interest in the said property is defeasible

[46] The learned trial judge's decision on this third issue can be found in paras 93–95 of His Lordship's grounds of judgement as follows:

> [93] Fakta berhubung pemilikan hartanah tersebut berdasarkan daftar hakmilik Pejabat Tanah/PTG adalah jelas. Plaintif adalah pemilik asal. Defendan pertama (si mati) selepas itu didaftarkan sebagai pemilik seterusnya. Defendan pertama [sic] kemudiannya memindahkan kepentingan hartanah tersebut kepada defendan kedua. Saya mendapati bahawa fakta menunjukkan bahawa defendan kedua sebagai 'pembeli seterusnya' yang suci hati (bona fide) tidak mempunyai pengetahuan tentang frod yang melibatkan defendan pertama.

[94] Pada hemat saya, sekiranya pindahmilik hartanah telah dikeluarkan secara tidak teratur/sah dan pindahmilik kepada defendan pertama adalah tidak sah (void) sekalipun, kepentingan defendan kedua kekal tidak boleh disangkal sebagai 'subsequent' chargee dan pembeli (bona fide purchaser for value) hartanah tersebut.

[95] Dalam keadaan tersebut saya mendapati Defendan Kedua berhak berlindung di bawah peruntukan seksyen 340(3) KTN yang memperuntukkan bahawa:

> 340 Pendaftaran untuk memberi, hakmilik atau kepentingan yang tak boleh disangkal, kecuali dalam keadaan tertentu
>
> (1) ...
>
> (2) ...
>
> (3) Jika sekiranya hakmilik atau kepentingan mana-mana orang atau badan adalah boleh disangkal oleh sebab apa-apa keadaan yang dinyatakan dalam subseksyen (2) —
>
> (a) maka ia hendaklah tertanggung untuk diketepikan dalam tangan mana-mana orang atau badan yang kepadanya ia mungkin dipindahmilik kemudiannya; dan
>
> (b) apa-apa kepentingan yang diberi kemudiannya hendaklah tertanggung untuk diketepikan dalam tangan mana-mana orang atau badan dalam mana ia adalah buat masa itu diletakhak:
>
> Dengan syarat bahawa tiada apa jua dalam subseksyen ini hendaklah menyentuh apa-apa hak atau kepentingan yang diperoleh oleh mana-mana pembeli dengan suci hati dan untuk balasan yang berharga, atau oleh mana-mana orang atau badan yang menuntut melalui atau di bawah seorang pembeli sedemikian.

[47] In short His Lordship found that the second defendant was a subsequent chargee and a *bona* fide purchaser for value under sub-s 340(3) of the NLC. Hence the second defendant's interest in the said property was indefeasible.

[48] Parties had submitted at length on the issue of whether the second defendant's interest in the said property was defeasible or not; including the issue of bona fide purchaser in good faith and for valuable consideration and the maxim of *nemo dat quod non habet.* However, with respect, we are of the considered view that what is most pertinent is whether the second defendant's position is similar to a subsequent purchaser or an immediate one. Authorities have shown that an immediate purchaser's title is liable to be set aside whether or not he is a bona fide purchaser.

[49] Of course the second defendant contends that it was a subsequent purchaser. Learned counsel for the second defendant relied on the majority decision of the Federal Court in *CIMB Bank Bhd v AmBank (M) Bhd & Ors* [2017] 5 MLJ 142. In that case, the original owner of the land, the Chongs,

had charged the land to the appellant, CIMB, as security for a banking facility. Subsequently, the Chongs sold the land to one Wong. Wong had used forged documents to remove CIMB as chargee and charged the land to the first respondent, Ambank, after Wong got himself registered as the new owner of the land. The Federal Court found Ambank to be a subsequent purchaser and therefore protected by sub-s 340(3) of the NLC.

[50] We are of the view that the *CIMB*'s case, can be distinguished from our instant appeal. In *CIMB*, although the discharge of the charge in favour of CIMB Bank was done fraudulently, there was no question that the land was sold by the Chongs to Wong. Hence, Wong's position was of the immediate purchaser. Ambank had derived its interest as a chargee from Wong. Therefore Ambank obviously became the subsequent holder or purchaser.

[51] In this appeal before us, the said property was never sold to the first defendant. The first defendant obtained the title by way of forged documents. The first defendant was a fraudster and there was no doubt about this. Unlike *CIMB*, where the sale and purchase agreement between the Chongs and Wong was genuine, there was no such dealing here. The first defendant was a mere fraudster. The situation is just like in the case of *Pushpaleela*, wherein the second defendant was regarded as an immediate purchaser as he bought the land from the fraudster who impersonated the true owner. In another case, *Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal* [2016] 5 MLJ 141; [2017] 3 CLJ 257, the Federal Court had, inter alia, held, the third and fourth defendants who purchased the land from a fraudster who used a forged power of attorney were immediate purchasers. And as immediate purchasers of a title tainted by the forged power of attorney, the third and fourth defendants acquired a title that was defeasible and liable to be set aside.

[52] Reverting to our appeal, in such circumstances, we do not hesitate to hold that the second defendant's interest in the said property is defeasible. Consequentially, we hold that the second defendant's registered charge interest in the said property is defeasible and be set aside. See also the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269.

If the answers in (i) and (ii) are in the affirmative, whether the plaintiff and/or the second defendant are/is entitled to damages

[53] The plaintiff in his re-amended statement of claim had, inter alia, in para 53(j) prayed for the following relief:

> (j) in the event this Honourable Court recognises that the second defendant's registered charge interest in the Property is valid and enforceable, the Plaintiff claims damages from the 3rd, 4th and/or 5th to 15th Defendants for the loss of his unencumbered proprietorship interest in the Property;

The second defendant in its pleadings had, inter alia, pleaded negligence against the Land Office and therefore sought in its amended counterclaim the following reliefs in para 47(3), (7):

> (3) Special damages in the sum of RM1,955,000.00 of bearing the total loan sum disbursed to the first Defendant and/or to Messrs Ku Abdul Rahman & Associate pursuant to the Facility Agreement dated 20.1.2010 as against third to fifth Defendants; ...
>
> ...
>
> (7) General damages;

[54] The learned trial judge's decision on this issue can be found in para 118 of His Lordship's grounds of judgement as follows:

> [118] Berdasarkan kepada keputusan/dapatan saya bahawa kepentingan Defendan Kedua ke atas hartanah tersebut adalah tidak boleh disangkal (*indefeasible*) dan Defendan Ketiga hingga Ketigabelas adalah bertanggungjawab terhadap kehilangan hartanah Plaintif tersebut maka berdasarkan Pernyataan Tuntutan Dipinda Semula Plaintif di perenggan (*prayer*) 52 (m) di mana Plaintif memohon 'relief lain dan selanjutnya yang difikirkan patut dan sesuai untuk diberikan oleh mahkamah', saya memutuskan:
>
> (i) Defendan Kedua berhak meneruskan dengan tindakan lelongan hartanah tersebut bagi mendapatkan balik baki pinjaman oleh penggadai (Defendan Pertama/Simati) gantirugi khas berjumlah RM1,955,000.00 yang bertunggak. Sekiranya hasil jualan lelongan masih tidak mencukupi, baki hendaklah dibayar/ditanggung oleh Defendan Ketiga hingga Ketigabelas.
>
> (ii) Sekiranya terdapat lebihan hasil lelongan hartanah tersebut, ianya hendaklah dibayar kepada Plaintif dan sekiranya hasil lelongan tidak mencukupi untuk menampung ganti rugi yang dituntut oleh Plaintif akibat kehilangan hartanah beliau, baki gantirugi tersebut hendaklah dibayar/ditanggung oleh Defendan Ketiga hingga Ketigabelas.

[55] In other words, the learned trial judge had ordered the second defendant to proceed with the auction of the said property to recover the amount of special damages in the sum of RM1,955,000. If proceeds of the auction are insufficient to cover such amount, the shortfall shall be recovered from the Land Office. If there is any balance from the proceeds of the auction, such money is to be paid to the plaintiff. If the proceeds of the auction is not sufficient to cover the damages claimed by the plaintiff, the amount shall be paid by the Land Office.

[56] Based on the plaintiff's pleadings as cited above, and based on our decision as explained earlier on, we find the issue of damages to be paid to the plaintiff is no longer relevant. We have found the second defendant's registered

A interest in the said property to be defeasible which means it is invalid and unenforceable. Hence the said property shall be retransferred to the plaintiff. The plaintiff's pleadings clearly spelt out that he will only seek for damages if the second defendant's registered interest in the said property is found to be valid and enforceable and we have found that it is not.

B

[57] What we need to decide now is whether the second defendant is entitled to claim for damages from the Land Office as elucidated in their counterclaim.

C **[58]** The learned ALA in his submission contended that s 340 of the NLC does not provide for the award of damages. Thus the court has no jurisdiction to make such an award. He found support in the recent Federal Court's decision in *Low Huat Cheng*.

D **[59]** For the second defendant, learned counsel submitted that the second defendant's pleaded case against the Land Office was premised In negligence. She submitted that the Land Office is accountable for its negligence which facilitated the fraudulent transfer of the said property. Learned counsel relied on the cases of *Tho Siew Wah*; *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors (Tetuan Tay Ibrahim & Partners, third party)* [2014] MLJU 1868; [2014] 8 CLJ 107 to show that the court had in other cases previously held the Land Office to be liable to indemnify parties for failure to perform their statutory duties.

E

F **[60]** We have considered this issue very carefully. The Federal Court in *Low Huat Cheng*, had inter alia, stated the following:

> [48] ... it is important to appreciate that the cause of action envisaged under s 340 of the NLC is a statutory claim, where the relief is explicitly specified therein, that is to say, setting aside the title or interest in question. Once the legislative scheme in s 340 is properly understood, it is apparent that the provision does not envisage a relief in damages at all; there is clearly no provision in relation to damages. In this regard, there is a general rule that when right is created by a statute and a special sanction is also given by the same statute regard must be had to that sanction, and the obligation can only be enforced in the prescribed manner (*see the Cobar Corporation Limited and Rubind Henrik Corbett (Trustee) v The Attorney-General For New Sourth Wales* [1909] 9 CLR 378).

G

H

> [56] By awarding damages to the plaintiff, the High Court and the Court of Appeal had extended the scope of s 340 of the NLC. With respect, the High Court and the Court of Appeal had no jurisdiction to do so. The award of damages is not within the contemplation of the Legislature.

I

> [57] As a result, for all the reasons set forth earlier, we therefore conclude that s 340 of the NLC does not provide for the remedy of damages. In our judgement, all that s 340 provides is the setting aside of the impugned title or interest upon one or more of the grounds of defeasibility specified therein. Yet again, keeping in mind that it is an action in rem, which is an action directed towards property, we are not at all

convinced that under s 340 of the NLC the court has the power to award damages. With respect, both the High Court and the Court of Appeal erred in law and in fact culminating in a miscarriage of justice in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. This is in itself sufficient to warrant appellate interference on our part.

[61] Based on the above, we agree that the learned ALA was not wrong to submit that s 340 of the NLC does not provide for the award of damages. However, with due respect to the learned ALA that is not the only issue decided by the Federal Court in *Low Huat Cheng*. Azahar Mohamed FCJ (as His Lordship then was) had also held the following:

[49] Legal rights are either in *rem* or in *personam*. We should point out that a statutory claim brought to set aside a title or interest upon one or more of the grounds of defeasibility specified under s 340 of the NLC, as in the present case, is an action in *rem* brought for the assertion of property, which is enforceable against the world at large, as opposed to right in *personam* for damages which is enforceable against specified person and arose out of an obligation whether in contract or in tort (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997 1 MLJ 77; [1997] 2 CLJ 36 and *Webb v Webb (ECJ)* [1994] QB 696). Some 60 years ago, the case of *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97; [1956] 1 LNS 14, Thomson J (as His Lordship then was) reminded us that many of the difficulties in cases relating to land, 'would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights'. We will deal with the plaintiff's claim *in personam* for damages at a later stage of this judgement.

[59] It is to be emphasised here that the concept of indefeasibility does not exclude the court's jurisdiction to grant relief in a claim *in personam* founded in law or equity which is enforceable against or binding on the registered proprietor (see Teo Keang Sood and Khaw Lake Tee *in Land Law in Malaysia, cases and Commentary (supra)* at para 4.152). Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569 emphasised that the principle of indefeasibility of title 'no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant'. In the case of *Ho Kon Kim v Lim Gek Kim Betsy and Others and Another Appeal* [2001] 3 SLR(R) 220, the Singapore Court of Appeal held that the indefeasibility of title of a registered proprietor, or its agent, of land under the Land Titles Act (Cap 157, 1994 Rev Ed) was subject to exceptions, two of which were fraud on the part of the registered proprietor or its agent and claims *in personam* made against the registered proprietor or its agent by reason of his own conduct.

[60] We once again return to the present case. The plaintiff's claim *in personam* for damages against the third and fourth defendants was founded in tort of negligence. In his statement of claim the plaintiff averred that the third and fourth defendants accepted the transfer of the property from the second defendant even though they

had reasons to know that the Power of Attorney was false. This is how it was pleaded in para 9 of the statement of claim ...

[61] However, when it came to adducing evidence, the plaintiff had not at all brought home the case of negligence against the third and fourth defendants. There was no attempt whatsoever by the plaintiff to affix any knowledge of the defective Power of Attorney on the part of the third and fourth defendants. On the contrary, the third and fourth defendants had proven their defence as *bona* fide purchasers of the property for value without notice. In our judgement, in the circumstances of this case, damages as a relief in a claim *in personam* founded in tort were only available if the plaintiff had proven that the third and fourth defendants had wronged him ...

[62] The above quotations clearly show that the concept of indefeasibility does not exclude the court's jurisdiction to grant relief in a claim *in personam* such as in this instant appeal. As we have stated earlier the second defendant's pleaded case against the Land Office is premised in negligence. We have earlier discussed how the improper conduct of the Land Office led to the finding of negligence by this court on their part. The evidence was there, led by the plaintiff as well as the second defendant.

[63] However, we must also bring the parties' attention to what the Federal Court in *Sum Kum v Devaki Nair & Anor* [1964] 1 MLJ 74 had held: 'In an action for damages, it is for the plaintiff to prove his damages, it is not enough to write down the particulars, and 'throw them at the head of the court, saying: This is what I have lost; I ask you to give me this damages'. He has to prove it'.

[64] In this suit, and notwithstanding the fact that we have held earlier that the second defendant's charged interest is defeasible, we have no problem with para 47(3) of the second defendant's amended counterclaim. There are indeed enough evidence to show the special damages. Our problem is with para 47(7) of the relief sought in the amended counterclaim, the general damages. There is no evidence on this at all. As with this court's decision in the recent case of the Civil Appeal No B-01(NCVC)(W)-326–09 of 2017 heard together with Civil Appeal No B-01(NCVC)(W)-359–08 of 2017, it is not enough for the second defendant to say that it had suffered losses without providing proof of the losses.

[65] Hence, as far as the second defendant's amended counterclaim is concerned, we hold that it is only entitled to the special damages as sought in para 47(3) of the reliefs sought, but not the general damages in para 47(7) of the same.

CONCLUSION

[66] Accordingly, we dismiss the Land Office's appeal in Appeal 394 in part in that the public auction of the said property does not arise since we have held that the second defendant's charged interest is defeasible. However, we hold the second defendant is entitled to be compensated the special damages proved by them in the form of the loan amount of RM1,955,000 disbursed by them to the first defendant and/or to Messrs Ku Abdul Rahman & Associates pursuant to the facility agreement dated 20 January 2010 as against the Land Office.

[67] We accordingly also allow the plaintiff's appeal in Appeal 395. For clarity sake, we therefore set aside the High Court order dated 29 August 2016 and substitute that order with the following order

(a) plaintiff's claims are allowed as in prayers (a), (b), (c), (d), (e) (h) and (i) of the plaintiff's reamended statement of claim; and

(b) the Land Office is liable to pay the second defendant the special damages in the sum of RM1,955,000 as prayed in para 47(3) of the second defendant's amended counterclaim.

[68] We order costs to be paid to the plaintiff by the second defendant and by the Land Office in respect of Appeal 395, and no costs is awarded in respect of Appeal 394.

Appeal 394 dismissed and Appeal 395 allowed.

Reported by Ahmad Ismail Illman Mohd Razali